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No. ____

IN THE
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, ONE OF ITS TRUSTEES,
Petitioners,

v.

REIMER EXPRESS WORLD CORPORATION, A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES LIMITED, A CANADIAN CORPORATION,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOP A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

No. 99 C 2524.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs,

v.

REIMER EXPRESS WORLD CORP., A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES, LTD., A CANADIAN CORPORATION,
Defendants.

Jan. 31, 2000

MEMORANDUM AND ORDER

MORAN, Senior J.

Plaintiffs bring this action under the Employee Retirement Income Security Act of 1974 (ERISA) claiming that defendants are responsible for money owed to a pension fund by defendants' corporate affiliate. Defendants have moved to dismiss the complaint on a variety of grounds. For the reasons stated below, we grant defendants' motion to dismiss.

BACKGROUND

In April 1988, Inter-City Truck Lines, Inc. (Inter-City or ICTL) began contributing to the Central States, Southeast and Southwest Areas Pension Fund (the Fund) on behalf of Inter-City employees. The Fund is a trust organized under Illinois

law with its principal place of business in Illinois. We shall refer to the Fund and its trustee Howard McDougall collectively as plaintiffs. Before it went out of business in 1993, Inter-City was a Canadian trucking company which operated in Detroit, Michigan, but had its principal place of business in Canada. Inter-City was owned by defendant Reimer Express Enterprises, Ltd. (REE), also a Canadian corporation, with its principal place of business in Canada. REE also owns defendant Reimer Express World Corp. (REWCOR), a Canadian corporation formed on November 29, 1993. We shall refer to REE and REWCOR collectively as defendants.

In May 1993, Inter-City went out of business and ceased to have an obligation to contribute to the Fund. This effected a "withdrawal" under ERISA, as amended by the Multi-employer Pension Plan Amendment Acts of 1980, 29 U.S.C. § 1383. In order to protect pension plan participants, ERISA requires employers withdrawing from a pension plan to pay their share of the plan's unfunded vested benefits, *i.e.*, the shortfall between the present value of the fund's assets and the present value of the vested pension benefits the plan will be obligated to pay out in the future. The statute refers to this amount as the employer's "withdrawal liability." 29 U.S.C. §§ 1381, 1391. The Fund assessed Inter-City's withdrawal liability to be $310,922.12. Relying on the "control group" provisions of ERISA, 29 U.S.C. § 1301(b)(1), which make businesses under common control jointly and severally liable for any affiliate's withdrawal liability, the Fund also determined that defendants were responsible for Inter-City's withdrawal liability. On June 23, 1994, defendants received notice from the Fund demanding payment in the amount of Inter-City's withdrawal liability plus interest. Defendants requested a review of the Fund's determination, which the Fund rejected on November 1, 1994.

Plaintiffs thereafter filed this action claiming that defendants are responsible for the withdrawal liability owed by Inter-City. Defendants have moved to dismiss the complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim. Because we dismiss the complaint for lack of personal jurisdiction, we do not address defendants' other grounds for dismissal.

DISCUSSION

On a motion to dismiss plaintiffs bear the burden of demonstrating the existence of personal jurisdiction. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir.1997). In order to do so, plaintiffs must show either that defendants' contacts with Illinois were sufficient to confer jurisdiction under Illinois' long arm statute, or, alternatively, that defendants' contacts with the United States as a whole are sufficient to establish personal jurisdiction as a matter of federal law.[1] Plaintiffs fail on both accounts.

I. Illinois Contacts

A federal court has personal jurisdiction if a court in the state in which it sits would have such jurisdiction. *See* Fed.R.Civ.P. 4(k)(1)(A). In this case, we look to Illinois' long arm statute to determine whether we have personal jurisdiction over defendants. *See* 735 ILCS 5/209. The Illinois statute, in turn, provides that a court may exercise personal jurisdiction on any basis permitted by the Illinois

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[1] As discussed in part II below, this second alternative is available in this case because defendants are foreign corporations. *See* Fed.R.Civ.P. 4(k)(2). Defendants' status as foreign corporations also makes Rule 4(k)(1)(d) inapplicable in this case. That rule states that service of summons is effective to establish jurisdiction when authorized by federal statute. Fed.R.Civ.P. 4(k)(1)(d). However, ERISA—the federal statute at issue here--limits "extraterritorial service to a nationwide, not worldwide, scope." *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1086 (1st Cir.1992).

constitution and the Constitution of the United States. 735 ILCS 5/209(c); RAR, 107 F.3d at 1276. Under the Illinois constitution's due process clause, personal jurisdiction "is to be asserted only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." *Rollins v. Ellwood*, 565 N.E.2d 1302, 1316 (Ill.1990). Unfortunately, the Illinois courts have provided little guidance as to how Illinois due process differs from federal due process. *See* RAR, 107 F.3d at 1276; *Jamik, Inc. v. Days Inn of Mount Laurel*, 1999 WL 1092008, at *2 (N.D.Ill. Nov. 30, 1999). Therefore, we will focus our inquiry on the federal constitutional requirements for personal jurisdiction.

Plaintiffs argue that personal jurisdiction over defendants is constitutionally permissible because the claims underlying this lawsuit arise out of defendants' specific contacts with Illinois. *See* 735 ILCS 5/209(f); *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 580 (7th Cir.1994). Plaintiffs' argument invokes the concept of specific jurisdiction. The Seventh Circuit recently elucidated the constitutional standards governing such cases:

> In specific jurisdiction cases, we must decide whether a defendant has "purposefully established minimum contacts within the forum State" and consider whether, by traditional standards, those contacts would make personal jurisdiction reasonable and fair under the circumstances. Crucial to the minimum contacts analysis is showing that the defendant "should reasonably anticipate being haled into court [in the forum State]," because the defendant has "purposefully avail[ed] itself of the privilege of conducting activities" there.

RAR, 107 F.3d 1277 (citations omitted). The Seventh Circuit also admonished that specific jurisdiction requires that

the lawsuit "arise out of" or "be related to" a defendant's minimum contacts with the forum state. *Id.* "We cannot simply aggregate all of a defendant's contacts with a state—no matter how dissimilar in terms of geography, time or substance—as evidence of the constitutionally-required minimum contacts." *Id.*

With these standards in mind we examine defendants' specific contacts in Illinois to determine whether this lawsuit arises out of those contacts in a manner sufficient to warrant exercising personal jurisdiction over defendants in this case. Plaintiffs point to a handful of contacts between REE and Illinois in support of their position. For example, plaintiffs argue that REE's acquisition of Inter-City, a company that conducted business in Illinois and participated in the Fund, is a contact sufficient to confer personal jurisdiction. Plaintiffs over-reach when they assert that the harm alleged in their complaint, failure to pay withdrawal liability, arose out of REE's acquisition of Inter-City. Under plaintiffs' theory, any alleged misconduct by Inter-City would subject REE to personal jurisdiction wherever Inter-City conducted business simply by virtue of REE's status as Inter-City's acquirer. Such a broad and unprecedented application of specific jurisdiction would be antithetical to the nature of the rule.[2] Furthermore, although plaintiffs state that the locus of the acquisition was in Illinois, the acquisition of Inter-City by REE has its more logical locus in Canada. Both REE and Inter-City are Canadian corporations and the acquisition of the latter by the former does not subject REE to specific jurisdiction in Illinois.

Plaintiffs also argue that certain communications between REE personnel and the Fund supply the necessary Illinois

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[2] As discussed more fully below, a parent-subsidiary relationship generally is insufficient to establish personal jurisdiction over the parent. *See Androphy v. Smith & Nephew, Inc.*, 31 F.Supp.2d 620, 622 (N.D.Ill.1998).

contacts. Chiefly, plaintiffs rely on a Fringe Benefit Agreement between Inter-City and the Fund which was executed by J.D. Cockburn, an REE official. Plaintiffs argue that Cockburn was an agent of REE and his execution of the Fringe Benefit Agreement gave rise to plaintiffs' claim, justifying specific jurisdiction over REE. It is apparent from the face of the Fringe Benefit Agreement, however, that Cockburn signed the contract on behalf of Inter-City and that the contract bound only Inter-City, not REE.[3] The agreement identifies Inter-City and the Fund as the two contracting parties and REE is neither mentioned or referred to in the document. Moreover, plaintiffs are not suing to enforce the Fringe Benefit Agreement in this lawsuit. Rather, plaintiffs' complaint seeks withdrawal liability based on the cessation of Inter-City's contributions to the Fund. This claim does not arise out of the Fringe Benefit Agreement, and therefore that contact cannot form the basis for specific jurisdiction over REE in this case.

Secondarily, plaintiffs point out that on two occasions Inter-City documents were forwarded to the Fund with fax cover pages bearing REE letterhead. Plaintiffs argue that these communications were sufficient to confer personal jurisdiction over REE in Illinois. We are unpersuaded. As a preliminary matter we observe that plaintiffs base their argument on the thin reed of two fax cover sheets bearing REE letterhead. The documents faxed along with these cover sheets were the Fringe Benefit Agreement and payroll documents. Both of these sets of documents related only to Inter-City, and the persons sending these documents to the Fund were acting on behalf of Inter-City. Indeed, the cover sheet sent along with the payroll documents plainly states that the person faxing the materials is from "ICTL (Payroll)."

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3 According to Cockburn's affidavit, Inter-City president Hugh Richardson authorized Cockburn to sign the Fringe Benefit Agreement on behalf of Inter-City.

That the fax cover sheets were preprinted with REE letterhead holds little relevance. Even if the persons sending the faxes were acting on behalf of REE and not Inter-City, personal jurisdiction over REE would not be warranted. A corporate parent, especially one that is a holding company like REE, may provide administrative services for its subsidiary without undermining corporate separateness and triggering personal jurisdiction over the parent. *See RAE Prod. and Chem Corp. v. Elf Aquitaine, Inc.*, 1994 WL 282279, at *3 (N.D. Ill. June 22, 1994); *Integrated Bus. Info. Serv. v. Dun & Bradstreet*, 714 F.Supp. 296, 299-300 (N.D.Ill.1989); *see also Calvert v. Huckins*, 875 F.Supp. 674, 679 (E.D.Cal.1995). In any event, this lawsuit does not arise out of the fax cover sheets, and those two pages are an insufficient basis upon which to exercise personal jurisdiction over REE.

The Illinois contacts plaintiffs rely on are sparse and tenuous. Even if the contacts may be ascribed to REE and not Inter-City, they did not give rise to the allegations in plaintiffs' complaint. Therefore, specific jurisdiction over REE does not exist.

II. National Contacts

The personal jurisdiction inquiry does not end in this case with our finding that defendants' Illinois contacts are insufficient. Under Rule 4(k)(2), service of process may be sufficient to confer personal jurisdiction in this case because defendants are foreign corporations. Fed.R.Civ.P. 4(k)(2). As amended in 1993, Rule 4(k)(2) provides:

> If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons . . ., is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

According to the Advisory Committee Notes, Rule 4(k)(2) was enacted to fill a specific gap in the federal law presented when a foreign defendant may have significant aggregate contacts with the United States, but insufficient contact with any single state to support jurisdiction under state long-arm statutes. The rule first requires a court to determine whether the case arises under federal law and whether the foreign defendant lacks sufficient contact with any single state to subject it to personal jurisdiction there. If so, the court must then "scrutinize plaintiff's allegations to ascertain whether plaintiff has demonstrated that defendant has sufficient aggregate contacts with the United States to comport with constitutional notions of due process." *U.S. v. International Broth. of Teamsters*, 945 F.Supp. 609, 617 (S.D.N.Y.1996); *see Pyrenee, Ltd. v. Wocom Commodities, Ltd.*, 984 F.Supp. 1148, 1159 (N.D.Ill.1997).

With respect to the preliminary conditions, plaintiffs bring this cause of action under ERISA and therefore it arises under federal law. As discussed above, defendants' contacts with Illinois are insufficient to subject them to specific personal jurisdiction there and, for the purposes of this motion, we will assume that defendants' contacts similarly are insufficient to subject them to jurisdiction in any single state. Therefore, we are left to examine defendants' aggregate national contacts in order to determine whether the due process clause of the Fifth Amendment permits us to exercise personal jurisdiction under Rule 4(k)(2). *See Pyrenee*, 984 F.Supp. at 1159.

Plaintiffs argue that defendants' corporate affiliation with Inter-City, a company which conducted extensive business in the United States, provides the aggregate national contacts necessary for exercising personal jurisdiction. This argument is flawed. The activities of Inter-City cannot be attributed to defendants. As plaintiffs concede, in general "the parent-subsidiary relationship is insufficient to confer personal jurisdiction." *Androphy v. Smith & Nephew, Inc.*, 31 F.Supp.2d 620, 622 (N.D.Ill.1998). Courts in this circuit

repeatedly have emphasized "that '[p]arents of wholly owned subsidiaries necessarily control, direct and supervise the subsidiaries to some extent' but anything less than the degree of control necessary to pierce the parent corporation's veil of liability is insufficient to establish personal jurisdiction over the parent." *Insolia v. Philip Morris, Inc.*, 31 F.Supp.2d 660, 669 (W.D.Wis.1998) (*quoting IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir.1998)); Integrated Bus., 714 F.Supp. at 299-300. Where the parent corporation is a holding company, as defendants are in this case, it is even more difficult to establish the degree of control required to exercise personal jurisdiction over the parent. *See* RAE, 1994 WL 282279, at *3.

Plaintiffs have presented no allegations establishing that defendants were the alter ego of Inter-City, or that defendants exercised the degree of control over Inter-City necessary to pierce the corporate veil. Plaintiffs do not allege that defendants exerted substantial control over Inter-City's day-to-day activities. *See Androphy*, 31 F.Supp.2d at 622; RAE, 1994 WL 282279, at *3. Inter-City's conduct cannot be imputed to REE simply by virtue of the latter's ownership of the former. More is needed to establish personal jurisdiction over a parent for the conduct of its subsidiary. The allegations in the complaint fall short.

Inter-City's national contacts are not attributable to defendants for the purposes of assessing personal jurisdiction. Defendants' own national contacts, as alleged in the complaint, are no more than the Illinois contacts discussed and found lacking above. Having failed to allege sufficient contacts for us to exercise personal jurisdiction over defendants in a manner consistent with the Constitution, plaintiffs' complaint must be dismissed.[4]

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[4] Plaintiffs' request for discovery into the personal jurisdiction issue must also be denied. The contacts asserted by plaintiffs as jurisdiction-

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is granted.

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the defendants' motion to dismiss is granted.

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conferring are doubly flawed—they are attributable to Inter-City and not to defendants, and they do not give rise to the harms alleged in the complaint. Discovery is inappropriate when a plaintiff has not offered a colorable basis for jurisdiction, particularly when discovery is sought against a foreign corporation for the alleged conduct of its subsidiary. *See Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185-86 (2d Cir.1998); *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 311-12 (S.D.Ind.1997); We see no reason to subject the foreign defendants to the discovery process in this case.